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Michael D. Alembik

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RECENT CASES

TORTS—WILLFUL TORTS OF EMPLOYEES—
EMPLOYERS' LIABILITY—EXTENSION OF
VICARIOUS LIABILITY

It was once held that a master was not liable for the unauthorized willful torts of his servant,¹ but the development of vicarious liability principles led the courts to say that a command could be "implied" from the employment² and the liability thus imputed to the master.

Nevertheless, it is usually held that one who acts entirely for his benefit or from personal motive, is outside the scope of his employment³, but a further development of the respondeat superior doctrine has resulted in a well-settled rule which holds the master liable for seemingly personal torts if the court can find a reasonable connection with the employee's work. This is based on a finding that there was a furtherance of the master's business or his interests, or from an impulse or emotion arising from the employment or in some way incident thereto.⁴

In *Ochsrider v. Reading Co.*,⁵ Randazzo, an employee of defendant railroad, who had a reputation for fault finding and

¹ Wigmore, Responsibility for Tortious Acts: It's History, 7 Harv. L. Rev. 315, 383, 441 (1894); Baty, Vicarious Liability, ch. 1 (1916); *Wright v. Wilcox*, 19 Wend. 343 (N. Y. 1838).

² Baty, Vicarious Liability, 81, 107 (1916), supra, note 1; 1 Bl. Comm. 429, 456⁷ 457; Ferson, Basis for Master's Liability to Third Persons, 4 Vand. L. Rev. 260 (1951); Seavey, Speculations as to "Respondeat Superior", Harvard Legal Essays 433, 451 (1934).

³ 2 Mechem, Agency (2d ed.), sec. 1929, 1960 (1914); Retatement (Second)⁹ Agency sec. 228 et. seq. (1958); *Panama R. Co. v. Bosse* 249 U. S. 41 (1919); *Baskett v. Banks*, 186 Va. 1022, 45 S. E. 2d 173 (1947); *Bradley v. Stevens*, 329 Mich. 556, 46 N. W. 2d 382, 34 A.L.R. 2d 367 (1951); 3 C.J.S., Agency sec. 255. It is said that if one acts partly for his benefit, and partly for the master's, the act falls within the scope of employment. Rest., Agency 2d. sec. 461.

⁴ *Horton v. Jones*, 208 Miss. 257, 44 So. 2d 397, 15 A. L. R. 2d 824 (1950); 3 Cooley, Torts (4th ed. 1932) sec. 393; 1 Rest., Agency 2d sec. 214, 228; 45 Harv. L. Rev. 342 (1931). Cases which have refused to extend the liability: *Bradlow v. American Dist. Tel. Co.*, 131 Conn. 192, 38 A2d 679 (1944); *Mandel v. Byram*, 191 Wis. 446, 211 N. W. 145 (1926); *Atlanta Baseball Co. v. Lawrence*, 38 Ga. 497, 144 S. E. 351 (1928); *Valley v. Clay*, 151 La. 710, 92 So. 308 (1922).

⁵ *Ochsrider v. Reading Co.*, 172 F. Supp. 830 (E. D. Penn. 1959).

was known as a quick-tempered, chronic complainer, suddenly left his work station asserting that plaintiff's crew was too slow in passing on work to him. Plaintiff tried to placate him, and without further provocation, Randazzo violently and persistently attacked the plaintiff causing serious personal injuries. The Court found, when an action was brought against defendant railroad on vicarious liability principles,⁶ that the act was not committed within the scope of employment nor with a view to furthering the defendant's business. The court felt that it could not infer that Randazzo, in the commission of the act, was inspired by any desire to "speed up" the operations in defendant's interests. The seriousness of the injuries suggested an attack arising from personal motive,⁷ *i.e.* to express resentment and gratify a vindictive temper.

Under the theory of some Virginia cases the court might have arrived at a different conclusion:

In *Tri-State Coach Corp. v. Walsh*,⁸ defendant bus company employed Mooney as a driver. While operating a bus in the usual manner, Mooney attempted to make a turn, the completion of which threatened to damage the plaintiff's car properly stopped beside the bus. Without completing the turn, Mooney stopped the bus, alighted, and engaged in an altercation with plaintiff leading to an attack by Mooney upon the plaintiff. The plaintiff brought an action against the bus company.

The court held that, although the tort was intentional and willful, the jury was justified in concluding that the result was an impulse or emotion which had arisen directly out of the

⁶ The action was brought under the Federal Employers Liability Act which provides that a railroad engaged in interstate commerce "... shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier . . ."; 45 U.S.C.A. sec. 51.

The statute has so been construed that negligence may embrace assault and battery, and the general principles of vicarious liability are applied. *Steeley v. Kurn*, 313 U. S. 545 (1940); *Nelson v. American-West African Line, Inc.*, 86 F2d 730 (2 Cir. 1936), cert. den. 300 U. S. 665 (1937); *Gibson v. Kennedy*, 23 N. J. 150, 128 A2d 480 (1957).

⁷ Citing Rest., Agency Sec. 235, comment c.

⁸ 198 Va. 299, 49 S.E. 2d 363 (1948); 47 Mich. L. Rev. 1028 (1949); cf Annot., 53 A.L.R. 2d 720 (1957), (Assault by taxicab or motorbus driver); Annot., 172 A.L.R. 532 (1948), (Assault by truck driver or chauffeur).

prosecution of the master's business and within the course of employment.

At page 305, the court said: ". . . Anger, malice, vindictiveness,—frailties of human nature,—are among the risks imposed upon the master in the employment of his servant. When these emotions are indulged in by the servant, even to the extent of committing a willful tort, if the ultimate purpose to be thereby attained is in the furtherance of the servant's duties and in the execution of the master's business entrusted to him, the master is liable for the resultant damage . . ." ⁹

In *Cary v. Hotel Rueger, Inc.*¹⁰, a bellboy employed by defendant hotel corporation shot and killed plaintiff's decedent in an elevator operated by the bellboy in defendant's hotel. It was held that the trial court properly struck the plaintiff's evidence, saying that the shooting resulted from an argument as to whether the employee owed the deceased money, and thus arose out of personal motive on the employee's part, the elevator being the mere chance location of the shooting. The court cited the *Tri-State Case* as controlling and quoted therefrom, supplying its own italics:

"*Had the turn been wholly negotiated* into State Street, thus avoiding the real or apparent danger of collision, and Mooney had then *abandoned the business of his master* and committed the tort solely to gratify personal feelings and not to accomplish or effect his insistence upon his right of movement, it would not have been within the scope of his employment; but here it was committed in the very act of *negotiating the turn.*" ¹¹

The above cases were decided pursuant to the principles enunciated in the *Davis v. Merrell*¹² case. There the court

⁹ Citing: 35 Am. Jur. Master and Servant, sec. 560; 3 C.J.S. Agency, sec. 255, 258; Rest., Agency, sec. 245; *Field v. Sanders*, 29 Cal. 2d 834, 180 P. 2d 684, 172 A.L.R. 525 (1947).

Cases holding contra tri-state: *Plotkin v. Northland Transp. Co.*, 204 Minn. 422, 283 N. W. 758 (1939), 23 Minn. L. Rev. 981 (1939); *Georgia Power Co., v. Shipp*, 195 Ga. 446, 24 S. E. 2d 764 (1943); *Wood v. South-eastern Greyhound Lines*, 302 Ky. 110, 194 S. W. 2d 81 (1946); cf. *Limpus v. London General Omnibus Co.*, 1 H. & C. 526, 158 Eng. Rep. 993 (1862). (Leading case).

¹⁰ 195 Va. 980, 81 S. E. 2d 421 (1954).

¹¹ *Id.*, at 985, quoting from 188 Va. at 305.

¹² 133 Va. 69, 112 S. E. 628 (1922).

properly refused an instruction which would have required the jury to find for defendant if they were of the opinion that the agent's act was not required or authorized by the defendant railroad where the watchman at a train crossing shot and killed plaintiff's decedent after an argument regarding the raising of the gates. The defendant railroad, being the employer of the watchman, was held liable.

In *Cary v. Hotel Rueger*¹³, the court compared the *Tri-State* and *Davis Cases* saying that in the former the argument arose out of the operation of a bus, which was the duty of the employee; in the latter, the argument concerned the raising and lowering of gates over a railroad at a street crossing, also the duty of the employee—whereas in the case at bar the argument was over the collection of money, and the shooting did not arise out of the bellboy's services.

It can be stated generally that a master may now be liable for willful acts of his servant leading to assault and battery¹⁴, false imprisonment,¹⁵ malicious prosecution,¹⁶ defamation,¹⁷ misrepresentation¹⁸, or conversion¹⁹ where the employment is of a kind likely to lead to an opportunity or incentive to commit such torts and the servant could have been motivated or inspired to serve the master by such tortious acts.

It is proposed that such motive is at least dubious if not ludicrous. The extent of scope of employment is unfortunately outlined in rather shadowy boundaries and the courts have allowed fiction to superimpose fiction. A willful tort should be considered as an extraordinary act which is not the result of the employment or presumed to be incited to benefit the master,

¹³ Note 10, *Supra* at 986.

¹⁴ *Prince v. Bricchell*, 87 Ga. App. 697, 75 S. E. 2d 288 (1953); *Lipman v. Atlantic Coast Line R. Co.*, 108 S. C. 151, 93 S.E. 714 (1917).

¹⁵ *Palmer v. Maine Central R.R.Co.*, 92 Me. 399, 42 A. 800 (1899).

¹⁶ *Manual v. Cassada*, 190 Va. 906, 59 S.E.2d 47 (1950); *Eastman v. Leiser Co.*, 148 Minn. 96, 181 N.W. 109 (1921); Rest. 2d, Agency sec. 246, 253.

¹⁷ *Slaughter v. Valleydale Packers*, 198 Va. 339, 94 S.E. 2d 260 (1956); Rest 2d, Agency sec. 247, 254; 35 Am. Jur. Master and Servant sec. 568.

¹⁸ *Gleason v. Seaboard Air Line Ry.*, 278 U. S. 349 (1929); Rest. 2d. Agency sec. 249, 257-64.

¹⁹ *Powell v. Brown Motor Co.*, 200 S.C. 75, 20 S.E. 2d 636 (1942); *Wembach Corp. v. Emigrant Savings Bank*, 34 N. Y.S. 2d 688, 264 App. Div. 161, affd. 289 N. Y. 662, 45 N.E. 2d 169 (1942); 35 Am. Jur. Master and Servant sec. 571; Rest. 2d, Agency sec. 244.

but a personal act arising out of wanton or other malicious motives of a strictly private nature. The courts should thus separate willful and unintentional torts and be more discriminating in making the employer respond.

In the *Ochsrider case*, the court, looking to the viciousness of the assault, rightly held that Randazzo could only be acting from personal motives. Whereas in the *Tri-State case* the court felt that Mooney was furthering his employer's business by arrogantly refusing to give defendant motorist the right of way, and assaulting him.

Accepting the logic of the *Tri-State case*, must we assume that, since bus drivers who attack motorists who are innocently and temporarily obstructing rights of locomotion are engaged in furthering the interests of employers, then employees who go about beating up fellow employees because the work is progressing too slowly to suit them are also acting to further employers' benefits?

No doubt there is justification in holding the master liable in cases where the servant is negligently selected or retained,²⁰ the master's duties are clearly non-delegable,²¹ a dangerous instrumentality is involved,²² or the master has ratified the act.²³

In some cases the extension of the doctrine has been inspired by the principle which allows recovery against the master for the purely personal intentional torts of the agent if the master is under a public or contractual duty to the plaintiff which requires the latter's protection; this is based on the

²⁰ *Wright v. Wright*, 229 N.E. 503, 50 S.E. 2d 540 (1948); *Central of Georgia R. Co. v. Hall*, 124 Ga. 322, 52 S.E. 679 (1905); Rest. Agency, sec. 440.

²¹ *Louisville & N.R. Co. v. Steele*, 179 Ky. 605, 201 S.W. 43 (1918); *Ashby v. Norfolk Southern R. Co.*, 172 N.C. 98, 89 S.E. 1059 (1916); *Linam v. Murphy*, 360 Mo. 1160, 232 S.W. 2d 937 (1950).

²² *Dempsey v. Chambers*, 154 Mass. 330, 28 N.E. 279, 13 L.R.A. 219, 26 Am.St. Rep. 249 (1891); *Southern R. Co. v. Chambers*, 126 Ga. 404, 55 S.E. 37 (1906); *Dowler v. Johnson*, 225 N.Y. 39, 121 N.E. 487, 3 A.L.R. 146 (1918); *Novick v. Gouldsberry*, 173 F.2d 496 (1949).

²³ *Virginia Elec. Co. v. Lenz*, 158 Va. 732, 164 S.E. 572 (1932); *Goodard v. Grand Trunk R.R.*, 57 Me. 202, 2 Am. Rep. 39 (1869); *Lipman v. Atlantic Coast Line R. Co.*, 108 S. C. 151, 93 S.E. 714 (1917). 10 Am. Jur. 105, Carriers, sec. 1121 *et seq.*

common law liability of carriers²⁴ and innkeepers.²⁵ These cases may be explained on the assumption that a public utility, or any association imbued with a certain muniment of public respect and duty above the ordinary, may be subjected to a higher standard of liability.

Applying our previous proposition, it is difficult to differentiate among servants and others when the tortious act is of such a personal nature. It is admitted that, had the courts limited this doctrine (*viz.* the unusual standard of liability placed on organizations which owe more extensive duties to the public) to its common law boundaries, the results might not have been as startling. The extension indicates another artificial development of the vicarious liability concept. The trend can as easily be extended, perhaps unconsciously, to any master who could expect a third party to rely on his agent.

M. D. A.

²⁴ *Dixon v. Hotel Tutweiler Operating Co.*, 214 Ala. 396, 108 So. 26 (1926); 28 Am. Jr. 575, Innkeepers sec. 53.

This doctrine has been expanded to include: Telegraph companies (*Dunn v. Western Union Tel. Co.*, 2 Ga. App. 845, 59 S.E. 189 (1907)), Saloons (*Johnson v. Monson*, 183 Cal. 149, 190 p. 635 (1920)) and hospitals (*Vannah v. Hart Hospital*, 228 Mass. 132, 117 N.E. 328 (1917)).

²⁵ "The general proposition that a person shall be answerable for any injury which arises in carrying into execution that which he has employed another to do seems to be too large." *More v. Sanborne*, 2 Mich. 519, 59 Am. Dec. 209, approved in *Ducre v. Sparrow-Kroll Lumber Co.*, 168 Mich. 49, 133 N. W. 938; cf. 27 Mich. L. Rev. 229, 230 (1929); 40 A.L.R. 1212-19 (1926)).